Sivanesan a/l Achalingam v Pathmanathan a/l Kuppusamy (Majlis Peguam Negara, intervener)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-561–03 OF 2021
YAACOB MD SAM, RAVINTHRAN AND HASHIM HAMZAH JJCA
1 DECEMBER 2022

Legal Profession — Disciplinary proceedings — Disciplinary Board ('DB')/Committee ('DC') — Whether DC's and DB's findings and decisions in respect of complaint against lawyer were perverse — Whether relevant evidence given at hearing had not been considered — Whether High Court erred in upholding findings and decisions of DC and DB

Labour Law — Industrial Court — Locus standi of counsel to represent party — Whether party intending to be represented by legal practitioner in proceedings before Industrial Court had to sign and file Forms A and B pursuant to rr 3 and 4 of Industrial Court Rules 1967 — Whether failure to do so would deprive counsel of locus standi to represent party in proceedings before the court — Whether consequently party might not be able to hold counsel responsible if any negligence was committed

The first respondent ('R1') engaged the services of the Malaysian Trades Union Congress ('MTUC') to prosecute his claim for unfair dismissal against his former employer in the Industrial Court ('IC'). The MTUC assigned an industrial relations officer ('Sivananthan') to act for R1 in the case. Initially, the IC adjourned the hearing of the case to enable Sivananthan to sort out his representation of R1 with the MTUC General Council. On the adjourned hearing date, the appellant, an advocate and solicitor, informed the court that he would be acting for R1 in place of Sivananthan and undertook to file the Forms A and B under the Industrial Court Rules 1967. Both the Forms had to be signed by R1 — Form A was the application for permission to be represented by a legal practitioner whilst Form B was the warrant authorising the party's representative to represent him in the proceedings. As it happened, neither of the Forms was filed in court. When the matter came up for case management on 6 April 2010 in the presence of the appellant, Sivananthan and counsel ('Rajan') for R1's former employer, the court fixed the trial dates for the matter. However, on the trial date, neither R1, the appellant nor Sivananthan appeared in court, causing the case to be struck off. The IC refused to reinstate the case. R1 sued the MTUC and Sivananthan for negligence and succeeded. As for the appellant, R1 filed a complaint against him with the Advocates and Solicitors Disciplinary Board ('DB'). The Disciplinary Committee ('DC')

found the appellant guilty of various counts of misconduct under the Legal Profession Act 1976 and the Legal Profession (Practice and Etiquette) Rules 1978 and recommended that he be punished with a RM10,000 fine. The DB affirmed the findings and recommendation of the DC and imposed the fine. The High Court dismissed the appellant's appeal against the DB's decision and agreed with the DC's findings that the appellant: (a) had informed the IC that he represented R1 without R1's knowledge; (b) failed to honour his undertaking to the court to file Forms A and B; and (c) breached his professional duty in failing to inform R1 of the trial dates and in failing to appear in court on the hearing date thereby causing the case to be struck off. In the instant appeal, the appellant contended that he was never formally engaged by R1 to act as his counsel and therefore he was never under a duty to inform R1 about the trial dates of his case. The appellant also argued that the High Court judge failed to appreciate that the DC and DB had applied a wrong burden of proof.

Held, unanimously allowing the appeal, setting aside the High Court's decision and ordering the fine, if paid by the appellant, to be refunded to him:

(1) The parties in the instant case never disputed that Forms A and B under the Industrial Court Rules 1967, indicating the appointment of the appellant as R1's counsel, were never filed in court. It had always been the position of the Industrial Court that the proper filing of Forms A and B would determine whether the representative of either party had the locus standi to appear before the court as that party's representative. This court agreed with that position and did not see any reason to depart from it. Since Forms A and B were never filed, the appellant never had the locus standi to appear as R1's representative in the first place. Even R1 admitted that he never appointed the appellant to represent him (see paras 26 & 30–32).

(2) According to the appellant, when he appeared with Sivananthan and Rajan before the Industrial Court chairman in chambers on 6 April 2010, the appellant informed the chairman that he would not represent R1 since R1 had not executed Forms A and B. The chairman then said he would not record the appellant's statement since he was not the counsel on record. The chairman then requested the appellant to leave the chambers, which the appellant did, after which the trial dates were given in the appellant's absence. This version of events was confirmed by Rajan. The DC's rejection of Rajan's testimony simply because he could not remember the chairman's name or whether Sivananthan appeared with the appellant that day for an event which occurred some six years earlier was wholly misconceived. Rajan was able to depict and corroborate the appellant's version of the material part of the incident. There was nothing to suggest that Rajan had given false evidence before the DC or that his testimony was not credible. It was imperative to note that Sivananthan,

who was initially representing R1, appeared with the appellant on the last mention date and that both Sivananthan and the MTUC were already found liable for negligence against R1. For all those reasons, the DC and the DB failed to give proper weight to relevant evidence. This error rendered the DC's recommendation and the DB's decision highly perverse, warranting appellate intervention (see paras 33–37).

(3) Since there was no evidence to show that R1 had appointed the appellant to represent him, there was no obligation on the appellant's part to inform R1 of the trial dates of his case (see para 41).

(4) Although the standard of proof to establish misconduct was 'beyond reasonable doubt', the disciplinary proceedings were not subject to the rigid and strict adversarial procedures in criminal trials but could be conducted in any method or manner deemed appropriate so long as it was not in breach of any specific provision of the relevant statutes or regulations and did not result in a denial of natural justice to the member concerned. The court did not agree with the appellant on this ground of appeal (see paras 44 & 46).

[Bahasa Malaysia summary

Responden pertama ('R1') menggunakan perkhidmatan Kongres Kesatuan Sekerja Malaysia ('MTUC') untuk memulakan tuntutannya bagi pemecatan tidak adil terhadap bekas majikannya di Mahkamah Perusahaan ('MP'). MTUC menugaskan pegawai perhubungan industri ('Sivananthan') untuk bertindak bagi R1 dalam kes tersebut. Pada mulanya, MP menangguhkan pendengaran kes tersebut bagi membolehkan Sivananthan menyelesaikan representasi R1 dengan Majlis Agung MTUC. Pada tarikh perbicaraan yang ditangguhkan, perayu, seorang peguambela dan peguamcara, memaklumkan mahkamah bahawa beliau akan bertindak untuk R1 menggantikan Sivananthan dan berakujanji untuk memfailkan Borang A dan B di bawah Kaedah-Kaedah Mahkamah Perusahaan 1967. Kedua-dua Borang tersebut perlu ditandatangani oleh R1 — Borang A adalah permohonan kebenaran untuk diwakili oleh pengamal undang-undang manakala Borang B adalah waran yang membenarkan wakil parti mewakilinya dalam prosiding. Walaubagaimanapun, kedua-dua Borang tersebut tidak difailkan di mahkamah. Apabila perkara tersebut dikemukakan untuk pengurusan kes pada 6 April 2010 dengan kehadiran perayu, Sivananthan dan peguam ('Rajan') bagi bekas majikan R1, mahkamah menetapkan tarikh perbicaraan untuk perkara tersebut. Bagaimanapun, pada tarikh perbicaraan, R1, perayu mahupun Sivananthan tidak hadir ke mahkamah, menyebabkan kes tersebut dibatalkan. MP enggan mengembalikan semula kes tersebut. R1 menyaman MTUC dan Sivananthan kerana cuai dan berjaya. Bagi perayu, R1 memfailkan aduan terhadapnya kepada Lembaga Tatatertib Peguambela dan Peguamcara ('DB'). Jawatankuasa Tatatertib ('DC') mendapati perayu bersalah atas pelbagai pertuduhan salah laku di bawah Akta Profesion Undang-Undang

1976 dan Kaedah-Kaedah Profesion Undang-undang (Amalan dan Etiket) 1978 dan mengesyorkan agar beliau dihukum dengan denda RM10,000. DB mengesahkan dapatan dan cadangan DC dan mengenakan denda. Mahkamah Tinggi menolak rayuan perayu terhadap keputusan DB dan bersetuju dengan dapatan DC bahawa perayu: (a) telah memaklumkan MP bahawa beliau mewakili R1 tanpa pengetahuan R1; (b) gagal memenuhi akujanjinya kepada mahkamah untuk memfailkan Borang A dan B; dan (c) melanggar kewajipan profesionalnya kerana gagal memaklumkan R1 tarikh perbicaraan dan gagal hadir ke mahkamah pada tarikh perbicaraan sehingga menyebabkan kes tersebut dibatalkan. Dalam rayuan semasa, perayu berhujah bahawa beliau tidak pernah terlibat secara rasmi oleh R1 untuk bertindak sebagai peguamnya dan oleh itu beliau tidak pernah bertanggungjawab untuk memaklumkan R1 mengenai tarikh perbicaraan kesnya. Perayu juga berhujah bahawa hakim Mahkamah Tinggi gagal memahami bahawa DC dan DB telah menggunakan beban pembuktian yang salah.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan memerintahkan denda, jika dibayar oleh perayu, dikembalikan kepadanya:

(1) Pihak-pihak dalam kes semasa tidak pernah mempertikaikan bahawa Borang A dan B di bawah Kaedah-Kaedah Mahkamah Perusahaan 1967, yang menunjukkan pelantikan perayu sebagai peguam R1, tidak pernah difailkan di mahkamah. Ia sentiasa menjadi pendirian Mahkamah Perusahaan bahawa pemfailan Borang A dan B yang sepatutnya akan menentukan sama ada wakil mana-mana pihak mempunyai locus standi untuk hadir ke mahkamah sebagai wakil pihak tersebut. Mahkamah ini bersetuju dengan pendirian tersebut dan tidak melihat sebarang sebab untuk meninggalkannya. Memandangkan Borang A dan B tidak pernah difailkan, perayu tidak pernah mempunyai locus standi untuk hadir sebagai wakil R1 pada mulanya. Malah R1 mengaku tidak pernah melantik perayu mewakilinya (lihat perenggan 26 & 30–32).

(2) Menurut perayu, apabila beliau hadir bersama Sivananthan dan Rajan di hadapan pengerusi Mahkamah Perusahaan di kamar pada 6 April 2010, perayu memaklumkan pengerusi bahawa beliau tidak akan mewakili R1 memandangkan R1 tidak menandatangani Borang A dan B. Pengerusi kemudian berkata beliau tidak akan merekodkan kenyataan perayu kerana beliau bukan peguam yang direkodkan. Pengerusi kemudiannya meminta perayu meninggalkan kamar, yang perayu lakukan, selepas itu tarikh perbicaraan diberikan semasa ketiadaan perayu. Versi peristiwa ini telah disahkan oleh Rajan. Penolakan DC terhadap keterangan Rajan semata-mata kerana beliau tidak ingat nama pengerusi atau sama ada Sivananthan hadir bersama perayu pada hari itu untuk satu peristiwa yang berlaku kira-kira enam tahun sebelum ini adalah salah arah sepenuhnya. Rajan dapat menggambarkan dan mengesahkan versi

perayu tentang bahagian material kejadian tersebut. Tiada apa-apa yang menunjukkan bahawa Rajan telah memberikan keterangan palsu di hadapan DC atau bahawa keterangannya tidak boleh dipercayai. Adalah penting untuk ambil perhatian bahawa Sivananthan, yang pada mulanya mewakili R1, hadir bersama perayu pada tarikh sebutan terakhir dan kedua-dua Sivananthan dan MTUC telah didapati bertanggungjawab atas kecuaian terhadap R1. Atas semua sebab tersebut, DC dan DB gagal memberikan berat yang sewajarnya terhadap keterangan yang berkaitan. Kesilapan ini menyebabkan cadangan DC dan keputusan DB sangat songsang, memerlukan campur tangan rayuan (lihat perenggan 33–37).

(3) Memandangkan tiada keterangan menunjukkan bahawa R1 telah melantik perayu untuk mewakilinya, tiada kewajipan di pihak perayu untuk memaklumkan R1 tarikh perbicaraan kesnya (lihat perenggan 41).

(4) Walaupun standard pembuktian untuk membuktikan salah laku adalah 'di luar keraguan munasabah', prosiding tatatertib tidak tertakluk kepada prosedur adversarial yang tegar dan ketat dalam perbicaraan jenayah tetapi boleh dijalankan dalam apa-apa kaedah atau cara yang difikirkan sesuai selagi ia tidak melanggar mana-mana peruntukan khusus statut atau peraturan yang berkaitan dan tidak mengakibatkan penafian keadilan semula jadi kepada ahli yang berkenaan. Mahkamah tidak bersetuju dengan perayu atas alasan rayuan ini (lihat perenggan 44 & 46).]

Cases referred to

Aero Manufacturing Sdn Bhd, Selangor v Kesatuan Kebangsaan Pekerja-Pekerja Syarikat-Syarikat Pembuat Keluaran Getah [1997] 2 ILR 416, IC (refd)

Bar Malaysia v Mohd Fadli Shuib & Anor [2014] 1 LNS 1934, CA (refd)

Bawani a/p Maruthapillai v Avani Sepang Goldcoast Resort (Golden Palm Tree Resort & Spa Sdn Bhd) [2019] ILJU 153; [2019] 2 LNS 1739, IC (refd)

Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener) [2018] 2 MLJ 265; [2018] 2 CLJ 1, FC (refd)

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (refd)

Island & Peninsular Bhd v Zaidah Tambar [2005] 2 ILR 909, IC (refd)

Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang [1980] 2 MLJ 191; [1980] 1 LNS 36, FC (refd)

Majlis Peguam v Cecil Wilbert Mohanaraj Abraham [2019] 5 MLJ 159; [2019] 5 CLJ 139, FC (refd)

Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor [2017] 1 MLJ 596; [2017] 2 CLJ 493, FC (refd)

Majlis Peguam v Mohinder Kaur Balbir Singh Deol [2011] 1 LNS 1910, CA (refd)

Ng Peng Soon v Wing Thung Trading Sdn Bhd [2018] 2 LNS 2125, IC (refd)

Sanders Hydroseeding Sdn Bhd v K Radhakrishnan SK Nair [1996] 2 ILR 1612, IC (refd)
Sithradevi a/p Nagalingam v Masdar bin Hj Darman & Anor (Majlis Peguam Malaysia, intervener) [2021] 2 MLJ 399; [2021] 3 CLJ 677, FC (refd)

Legislation referred to

Industrial Court Rules 1967 rr 3, 4, Forms A, B
Industrial Relations Act 1967 ss 20, 27(1)
Legal Profession Act 1976 s 103(1)

Appeal from: Originating Summons No WA-17D-39–12 of 2019 (High Court, Kuala Lumpur)

R Kengadharan (with L Nagarajan and S Lavenyia) (A Sivanesan & Co) for the appellant.
Respondent appeared in person.
Heng Yee Keat (Christopher & Lee Ong) for the intervener.

Hashim Hamzah JCA:

INTRODUCTION

[1] This is the hearing of the appellant's appeal against the decision of the learned High Court judge ('HCJ'), which was delivered on 22 February 2021, in which the learned HCJ dismissed the appellant's appeal against the decision of the Advocates and Solicitors Disciplinary Board ('DB') dated 16 November 2019 ('the said decision').

[2] In the said decision, the DB affirmed the finding and recommendation of the Advocates and Solicitors Disciplinary Committee ('DC') and imposed upon the appellant to pay a fine of RM10,000 only payable to the Discipline Fund within one month from the date of the decision and in default thereof, s 103(1) of the Legal Profession Act 1976 ('the LPA 1976') shall apply.

[3] This is our unanimous decision. Having heard the submissions and perusing the appeal records and the grounds of judgment of the learned HCJ in respect of this appeal, we are of the view that there is an appealable error committed by the learned HCJ which warrants appellate intervention for reasons set out below.

BRIEF FACTS

[4] Pertinent facts leading to the present appeal can be summarised as follows.

A **[5]** On 23 July 2007, the respondent was dismissed by his employer, Jord Malaysia Sdn Bhd with effect from 23 July 2007. Aggrieved with his dismissal, the respondent filed a representation under s 20 of the Industrial Relations Act 1967 ('the IRA 1967'). His representation was referred to the Industrial Court. The case was registered as Industrial Court Case No 3/4–2313/07.

B

[6] The respondent engaged the services of the Malaysian Trade Union Congress ('MTUC'), and Mr Sivananthan a/l Arumugam, an Industrial Relations Officer, was assigned to represent the respondent in the case.

C

[7] On 3 June 2008, the respondent's case was fixed for case management. Mr Sivananthan was absent from court that day and had also failed to comply with some of the court's pre-trial directions. As a result, the case was struck off. Mr Sivananthan later applied for the case to be reinstated, and the application
D was allowed. The respondent's case then proceeded to trial.

[8] On 24 Febuary 2010. Mr Sivananthan appeared for the respondent, and Mr Harjeet Singh Sidhu appeared for the respondent's former employer. The matter was heard in chambers, where Mr Sivananthan requested an
E adjournment and informed the court that he would not be able to continue with the case pending the decision from MTUC's General Council. The case was adjourned to 17 March 2010.

F **[9]** On 17 March 2010, the appellant informed the court that he would be taking over the case from Mr Sivananthan and undertook to file Form A (an application for permission to be represented by a legal practitioner) and Form B (a warrant of authority). The case was stood down until Mr Harjeet Singh Sidhu was in court at around 10am. When the case was recalled, the appellant informed the court that he had just received a call from Mr Sivananthan, who
G said that MTUC would decide on his issue in two weeks. The appellant requested another mention date. The case was adjourned to 30 March 2010.

[10] On 30 March 2010, Mr Sivananthan informed the court that the
H appellant would take over the respondent's case. He requested another mention date for the appellant to file Forms A and B and to fix a continued hearing date. The case was adjourned to 6 April 2010 for mention.

[11] On 6 April 2010, during the case management at the Industrial Court,
I it was recorded that a solicitor named Mr Rajan a/l Ayappan appeared on behalf of Messrs PS Sohanpal & Co, the legal firm that represented the respondent's former employer, and the appellant appeared for the respondent, together with Mr Sivananthan. The learned chairman stated in the minute:

> (M) to fix fresh dates for CH. To 13 & 14/9/10 (CH).

[12] When the matter came up for continued hearing on 13 September 2010, Mr Sivananthan, the appellant and the respondent were absent. The case was struck off. The grounds of the learned chairman can be seen in Award No 1185 of 2010. The respondent's attempt to reinstate his case through MTUC failed, as seen in Award No 416 of 2013.

[13] On 28 February 2014, the respondent sued Mr Sivananthan and MTUC for negligence in Shah Alam Sessions Court (Civil Suit No A52NCvC-69–02 of 2014). On 20 May 2015, after a full trial, the sessions court decided that Mr Sivananthan and MTUC were liable for negligence.

[14] On 13 June 2016, the respondent lodged a complaint against the appellant to the DB (No Aduan DC/16/0520). The complaint was then set for hearing before the DC.

[15] The DC, in its report dated 23 August 2018, found that the appellant had committed the following misconducts:

(i) Section 94(3)(b) for breach of duty to a court including the failure to comply with an undertaking given to the Industrial Court on 17 March 2010.

(ii) Section 94(3)(d) for breach of any rule of practice and etiquette, namely:-

  (a) Rule 6(a) and Rule 24(a) for failing to appear and represent the client on the required day and failing to be ready for trial on the day fixed;

  (b) Rule 16 for failing to uphold the interest of his client and the dignity of the profession;

  (c) Rule 17 for deceiving the court into believing that he was acting for the Complainant on 17 March 2010 and 6 April 2010;

  (d) Rule 31 for failing to uphold at alt times the dignity and high standing of the profession;

(iii) Section 94(3)(k) for breach of any provision of the LPA or of any rules made thereunder;

(iv) Section 94(3)(o) for being guilty of any conduct unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute and finally;

(v) Section 94(3)(n) for grossly disregarding his client's interest.

[16] In the same report, the DC made the following finding and recommendations to the DB:

C. RECOMMENDATION

45. It is unanimous recommendation of the DC that cause for disciplinary action exists and is of sufficient gravity to warrant the respondent to be subjected to the imposition of a fine amounting to RM10,000.00 as per Section 103C(1)(c)(ii) of the Legal Profession Act 1976.

[17] In the said decision, the DB affirmed the finding and recommendation of the DC and imposed upon the appellant to pay a fine of RM10,000 only payable to the Discipline Fund within one month from the date of the order and in default thereof, s 103(1) of the LPA 1976 shall apply.

LAW

[18] It is trite that the courts should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances, namely:

(a) when the findings are manifestly perverse;

(b) when the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(c) when there had been a breach of natural justice.

[19] Hashim Yeop A Sani J (as His Lordship then was) in the Federal Court decision of *Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang* [1980] 2 MLJ 191; [1980] 1 LNS 36 had this to say:

> We feel bound to reiterate here that the legal profession is an honourable profession whose members are expected to conduct themselves honourably. The appellants here were dealt with in a proceeding by virtue of a statute enacted to govern the conduct of members of their profession. Moreover, they were tried by their own peers. Members of the Disciplinary Committee were senior members of the profession who made firm findings of fact and they concluded that the appellants were guilty of misconduct in their practice as advocates and solicitors. The Chief Justice stated in *Au Kong Weng*'s case that statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

[20] In the Court of Appeal case of *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878, Gopal Sri Ram JCA (as His Lordship then was) said:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central

question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour.

[21] See also *Bar Malaysia v Mohd Fadli Shuib & Anor* [2014] 1 LNS 1934 (CA) and *Majlis Peguam v Mohinder Kaur Balbir Singh Deol* [2011] 1 LNS 1910 (CA).

[22] In *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265; [2018] 2 CLJ 1, Prasad Sandosham Abraham FCJ (as His Lordship then was) in delivering the judgment of the Federal Court, held:

[22] All these cases enunciate the point that the DC and/or like bodies, being a collegiate of peers, must be allowed to make findings of fact based on their experience in the profession under any given circumstances. The court must certainly not substitute themselves into the position of the DC in its review role. It is not for the court to say on the facts that the offending solicitor is guilty of professional misconduct or otherwise. So arguments on the merits should not be enunciated by the court and strong credence must be given to the findings of the DC which after all are subject to review by the DB which also consists of peers.

[23] We have considered the report of the DC and find there are no compelling grounds to interfere with its findings. The courts should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances ie:

(i) when the findings are manifestly perverse;

(ii) the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(iii) there had been breach of natural justice.

ISSUES

[23] The appellant raised several issues in the memorandum of appeal. During oral submission, the appellant focused on the following issues, namely:

(a) whether the appellant was representing the respondent when the case was mentioned on 6 April 2010;

(b) whether the appellant is obligated to inform the continued hearing dates to the respondent; and

(c) whether the DC or the DB had applied the wrong burden of proof in the disciplinary proceeding.

First issue: Whether the appellant was representing the respondent when the case was mentioned on 6 April 2010

[24] The learned counsel for the appellant submitted that the learned HCJ had erred both in law and in fact when she found that the appellant had appeared before the Industrial Court on 6 April 2010 as the respondent's appointed counsel.

[25] In the learned HCJ's grounds of judgment, she expressed her agreement with the findings of the DC that:

(a) the evidence of all witnesses and the Industrial Court's notes of proceeding during the disciplinary proceeding showed that the appellant did appear on behalf of the respondent without the respondent's knowledge;

(b) the evidence of Mr Rajan a/l Ayappan was not credible and inconsistent with the evidence of Mr Sivananthan and the Industrial Court's notes of proceeding;

(c) there was nothing in the Industrial Court's notes of proceeding to show that the appellant appeared before the Industrial Court to mention on behalf of Mr Sivananthan; and

(d) the learned chairman himself confirmed that the appellant was the respondent's just appointed counsel on 6 April 2010 in the award as follows:

> ... The case was mentioned on several dates and finally, on 6th April 2010, Mr Sivananthan appeared in chambers together with Mr A Sivanesan the claimant's just appointed counsel, whereupon the court assigned dates for the continued hearing of the case ie 13th and 14th September 2010.

[26] However, the parties in the present case never disputed that Forms A and B indicating the appointment of the appellant as the respondent's counsel was never filed in the Industrial Court.

[27] First and foremost, s 27(1) of the IRA 1965 reads:

> Section 27 Appearance and representation at proceedings before the Court.
>
> (1) *In any proceedings before the Court a party may —*
>
> (a) where the party is a trade union, be represented by an officer or employee of the trade union;
>
> (b) where the party is an employer, appear himself personally or be represented by his duly authorized employee, or by an officer or employee of a trade union of employers of which he is a member;

(c) *where the party is a workman, appear himself personally or where he is a member of a trade union of workmen, be represented bv an officer or employee of the trade union*;

(d) *where the party is* a trade union, or an employer, or a *workman, be represented with the permission of the President or the Chairman, by an advocate*, or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organization (not being a trade union) of employers or of workmen, as the case may be, registered in Malaysia.

(2) If any question arises before the Court as to whether the person representing a party under subsection (1) is —

(a) an officer or employee of the trade union which he represents;

(b) a duly authorized employee of the employer whom he represents; or

(c) an official of an organization mentioned in subsection (1)(d),

the question shall be determined by the President or the Chairman, whose decision thereon shall be final. (Emphasis added.)

[28] Rule 3 of the Industrial Court Rules 1967 reads:

Rule 3 Legal Practitioners.

(1) *Any party seeking, under the provisions of section 27 of the Act, the permission of the President to be represented at the proceedings before the Court by a legal practitioner shall make application in triplicate in Part I of Form A.*

(2) The Registrar shall serve a copy of Form A on the other party.

(3) Such other party may signify in Part II of the Form objections, if any, to the application made in Part I. If the Form be not returned to the Registrar at the premises of the Court within five days of the date of service, no objections to the application made subsequent thereto will be entertained. (Emphasis added.)

[29] Rule 4 of the Industrial Court Rules 1967 states that:

Rule 4 Warrant of Authority.

(1) *Any party who intends to be represented at the proceedings before the Court by a representative under the provisions of section 27 of the Act shall sign a warrant of authority in favour of such representative in Form B.*

(2) A party appearing before the Court by a representative shall be bound by the acts of that representative. (Emphasis added.)

[30] It has always been the position of the industrial court that the proper filing of Forms A and B will determine whether the representative of either party has the locus standi to appear before the Industrial Court as that party's

representative (see *Sanders Hydroseeding Sdn Bhd v K Radhakrishnan SK Nair* [1996] 2 ILR 1612; *Aero Manufacturing Sdn Bhd, Selangor v Kesatuan Kebangsaan Pekerja-Pekerja Syarikat-Syarikat Pembuat Keluaran Getah* [1997] 2 ILR 416; *Bawani a/p Maruthapillai v Avani Sepang Goldcoast Resort (Golden Palm Tree Resort & Spa Sdn Bhd)* [2019] ILJU 153; [2019] 2 LNS 1739; *Ng Peng Soon v Wing Thung Trading Sdn Bhd* [2018] 2 LNS 2125; and *Island & Peninsular Bhd v Zaidah Tambar* [2005] 2 ILR 909).

[31] We agree with this position and do not see any reason to depart from it.

[32] Since Forms A and B were never filed in the Industrial Court, the appellant has no locus standi to appear as the respondent's representative in the first place. Even the respondent admitted that he never appointed the appellant to represent him.

[33] According to the appellant:

(a) during the case management on 6 April 2010, the appellant and Mr Sivananthan informed the learned chairman in chambers that the appellant would not represent the respondent since the respondent did not execute Forms A and B;

(b) the learned chairman said he would not be recording the appellant's statement since he was not the counsel on record;

(c) the learned chairman informed the appellant to leave the court chambers, and the appellant complied, leaving the learned chairman and Mr Rajan in the chambers; and

(d) the continued hearing dates were given in the absence of the appellant.

[34] We find that the appellant's version was confirmed by Mr Rajan, who appeared on behalf of Messrs PS Sohanpal & Co, a legal firm representing the respondent's former employer on the day in question.

[35] We are of the view that the DCs grounds for not accepting Mr Rajan's testimony simply because he could not remember whether Mr Sivananthan appeared with the appellant and the name of the learned chairman for an event which occurred some six years before to be wholly misconceived. We found that Mr Rajan was able to depict and corroborate the appellant's version of the material part of the incident. There was nothing to suggest that he had given false evidence before the DC or that his testimony was not credible.

[36] At this juncture, it is also imperative to note that Mr Sivananthan from MTUC, who was initially representing the respondent, also appeared with the appellant on the last mention date. Both Mr Sivananthan and MTUC were

already found liable for negligence against the respondent.

[37] For the reasons above, we agree with learned counsel for the appellant that the DC and DB failed to give proper weight to the relevant evidence. This error rendered the DCs recommendation and the DB's decision highly perverse, warranting appellate intervention.

Second issue: Whether the appellant is responsible to inform the continued hearing dates to the respondent

[38] The learned counsel for the appellant submitted that the learned HCJ erred both in fact and in law when she found that the appellant was responsible to inform the continued hearing dates to the respondent.

[39] The learned HCJ, in her grounds of judgment, found that:

(a) the appellant informed the Industrial Court that he represented the respondent without the respondent's knowledge;

(b) the appellant failed to fulfil his solicitor's undertaking to file Forms A and B;

(c) the appellant failed to inform the respondent of the continued hearing dates and failed to appear to the Industrial Court on those dates resulting in the respondent's case being struck off; and

(d) it is the appellant's duty to ensure that Forms A and B are filed in court as he had given his undertaking.

[40] The learned HCJ also agreed with the finding of the DC in its report that:

> 40. Therefore, we find overwhelming evidence to show that the respondent had indeed appeared before the Industrial Court on 6 April 2010, wherein continued hearing dates were fixed on 13 and 14 September 2010 in his presence, and he had failed to inform the complainant of the continued hearing date.
>
> 41. The next to consider is whether or not the respondent was under a duty to inform the complainant of the continued hearing date. We answer this in the affirmative. It must be remembered that the very first date that the respondent appeared on behalf of the complainant on 17 March 2010, he had specifically given an undertaking to the Industrial Court for Forms A and B to be filed. A solicitor who gives his undertakings to any court is bound by it. There can be no two ways about this.
>
> 42. We also consider it irrelevant whether or not the complainant ultimately did not sign Forms A and B. Once the respondent who has at all times handed himself out as solicitor for the complainant to the court, then he is under a duty to act as his solicitor and discharge his obligations to the complainant which includes informing

A the complainant of the continued hearing date. It is then up to the complainant to decide whether or not to engage the respondent formally or to engage another solicitor or representative to replace the respondent. it certainly does not excuse the respondent from totally not informing the complainant of the continued hearing date.

B 43. Furthermore, we also consider that his failure to attend the continued hearing date to be a breach of his professional duties to his client. He cannot use the excuse that the client did not execute the Forms A and B and thus he is not representing the client when in the first place it was he who appeared for the client in court without having the Forms A and B executed and then goes on to give the court his Solicitors C undertaking that Form A and B will be filed by him.

[41] For reasons already set out above, we agree with the learned counsel for the appellant that there was no evidence to show that the respondent appointed the appellant to represent him in the Industrial Court, and therefore the D appellant has no obligation to inform the trial dates to the respondent.

Third issue: Whether the DC or the DB had applied the wrong burden of proof in the disciplinary proceeding

E **[42]** The learned counsel for the appellant submitted that the learned HCJ failed to apply the correct standard of proof, ie, beyond reasonable doubt, in her findings below.

F **[43]** It is trite that the standard of proof to establish misconduct is beyond reasonable doubt. See *Sithradevi a/p Nagalingam v Masdar bin Hj Darman & Anor (Majlis Peguam Malaysia, intervener)* [2021] 2 MLJ 399; [2021] 3 CLJ 677 (FC), *Dinesh Kanavaji a/l Kanawagi*, and *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159; [2019] 5 CLJ 139 (FC).

G **[44]** While we agree that the standard of proof to establish misconduct is beyond reasonable doubt, the disciplinary proceeding is not subject to the rigid and strict adversarial procedures in criminal trials. The disciplinary proceeding may be conducted in any method or manner deemed appropriate as long as it H is not in breach of any specific provisions of the relevant statutes or regulations and does not result in a denial of natural justice to the member concerned.

[45] In the exact words of Ramly Ali FCJ (as His Lordship then was) in the Federal Court case of *Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor* [2017] 1 MLJ 596; [2017] 2 CLJ 493: I

> [31] At the outset, it must be stressed that *disciplinary proceedings against a solicitor under the LPA are not proceedings in a criminal court of law*. The proceedings although quasi-judicial in nature *need not emulate the strict adversarial procedure practised in a criminal court* (see *Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis*

Peguam, intervenor) [2006] 2 MLJ 343; [2006] 1 CLJ 88). On this point we agree with Abdul Hamid Embong J (as he then was), in *Jerald Allen Gormez* when His Lordship commented: 'To say that, in the absence of such procedures, the disciplinary committee should adhere strictly to the procedures in the proceedings of a criminal court, would be implying some requirements not intended by statute'.

...

[33] It is a trite principle that a disciplinary committee of a professional body is entitled to conduct its disciplinary hearing in respect of a member of the body *in whatever way it deems appropriate provided that the method or manner it adopts is not in breach of any specific provisions of the relevant statutes or regulations and does not result in a denial of natural justice to the member concerned.*

[34] In *Lim Ko & Anor v Board of Architects* [1966] 2 MLJ 80; [1965] 1 LNS 96, the Federal Court held, inter alia, that the proceedings of disciplinary tribunals or committees conducting an inquiry are by no means bound by the strict rules which apply to criminal trials. A legalistic approach is not appropriate in those proceedings. The same principle was adopted by the Federal Court in *Tan Hee Lock v Commissioner for Federal Capital & Ors* [1973] 1 MLJ 238; [1973] 1 LNS 152; [1987] CLJ Rep 368; *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124; [1987] CLJ Rep 368; [1987] 2 CLJ 119 *and by the Court of Appeal in* and by the Court of Appeal in *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; [2003] 3 CLJ 310.

[46] Therefore, we disagree with the appellant on this issue.

CONCLUSION

[47] We agree with the learned counsel for the appellant on the two issues raised, except on the issue of the burden of proof. On that score, the two issues that we agreed upon, we allowed this appeal of the appellant and set aside the order of the High Court dated 22 February 2021. If the fine imposed has been paid, we ordered the fine to be returned to the appellant.

[48] On the cost of this appeal, we will give costs in the sum of RM5,000 to the appellant to be paid by the second respondent/intervener. We made no order as to costs against the first respondent.

Appeal allowed; High Court's decision set aside; and appellant to be refunded fine.

Reported by Ashok Kumar